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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order vacating its denial of the Petition for Writ of Certiorari, entered on November 25, 1974, and granting the petition. This petition for a rehearing is founded upon the decision of the Second Circuit Court of Appeals in *Brown* v. *General Services Administration* (No. 73-2628) (November 21, 1974), pp. 1a-17a, Petition For Writ of Certiorari filed December 20, 1974, No. 74-768.[1]

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[1] Counsel were notified by telephone of the decision in *Brown* in the late afternoon of Thursday, November 21, 1974, and obtained a copy of the decision in the afternoon of Friday, November 22, 1974. The instant Petition For Writ of Certiorari was considered at the conference of Friday, November 22, 1974, the result of which was announced on Monday, November 25, 1974. Under the circumstances Petitioner, of course, had no opportunity to bring this development to the attention of the Court prior to the denial of Certiorari.

The instant case presents the question, *inter alia*, whether the new remedies of section 717 of the 1964 Civil Rights Act, as amended, apply to discrimination occurring prior to March 24, 1972, the date on which that section became law. Section 717, 42 U.S.C. § 2000e-16, authorizes the district courts to provide to federal employees aggrieved by discrimination on the basis of race or sex the same remedies available to employees of private employers. There is a conflict among the courts of appeals on this question; three circuits have concluded that section 717 is applicable to discrimination occurring before March 24, 1972, and one circuit, in the instant case, has concluded that it is not. On November 25, 1974, this Court denied the Petition For Writ of Certiorari, Justices Stewart, White and Douglas voting to grant the writ. Whenever a federal employee has sought to assert federal jurisdiction under section 717 to remedy such discrimination, the government, in three circuits and at least twenty-four district courts, including the instant case, has opposed judicial scrutiny of such claims of discrimination by arguing that section 717 *does not* apply to discrimination occurring before March 24, 1972.

In *Brown* v. *General Services Administration* the government successfully advanced the opposite contention in preventing judicial scrutiny of Mr. Brown's claims; in the Second Circuit the government contended that section 717 *does* apply to discrimination occurring before March 24, 1972. The government there urged that section 717 had repealed a variety of statutes on which plaintiff founded his cause of action. Since the discrimination of which plaintiff complained had occurred prior to March 24, 1972, the government argued that section 717, and thus the repeal, applied to such discrimination occurring before the effective date of the section 717.

The Second Circuit, in holding at the instance of the government that section 717 applied to discrimination before its effective date, expressly rejected the contrary conclusion reached by the Sixth Circuit, also at the urging of the government, in this very case.

> In light of *Bradley*, we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger*, *supra*, that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only.[2]

At oral argument in *Brown*, the government expressly relied on *Koger* v. *Ball*, 497 F.2d 702 (4th Cir. 1974) and urged that this Court's decision in *Bradley* v. *School Board of the City of Richmond*, 40 L.Ed 2d 476 (1974), dictated that section 717 be applied to discrimination occurring prior to March 24, 1974. In the instant case petitioner advanced the identical argument[3] but the government refused to acknowledge its correctness.

That the government advanced inconsistent positions in these two cases was not the result of inadvertence. In *Brown* the government, in stating its assumption that section 717 applied to discrimination occurring before March 24, 1972, conceded the government "has argued differently" in other cases.[4] The Solicitor General was also made aware of the inconsistent position being taken by the government in different circuits.[5] Had the Solicitor General, in response to the Petition in this case, taken a definitive position as to whether or not the government maintained the decision of the Sixth Circuit was correct,

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[2] P. 11a.

[3] Petition for Writ of Certiorari, No. 74-116, pp. 17-19.

[4] Brief for Defendants-Appellees No. 73-2628, 2d Cir., p. 6 n.

[5] See Petition for Writ of Certiorari, p. 19.

uniformity in the position of the government in other case might have resulted. Instead, the Solicitor opposed Certiorari solely on the ground that the decision below was unimportant, thus avoiding committing the government to one position or the other.[6]

It has long been a precept of Anglo-Saxon jurisprudence, at least since Lord Mansfield's opinion in *Montefiori* v. *Montefiori,* 25 K.B. 203 (1762), that a party must not be permitted to advance inconsistent positions in judicial proceedings. See, e.g. Story's Equity Jurisprudence, 14th ed., § 2020.[7] The rule prevents a party from encouraging the growth of conflicts among the courts by seeking to win two inconsistent decisions where consistency would preclude him from winning more than one. "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts will not tolerate. . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano* v. *Central R. Co. of New Jersey,* 203 F.2d 510, 513 (3d Cir. 1953).

This Court has applied that principle in a variety of cases. In *Callanan Road Co.* v. *United States,* 345 U.S. 507 (1953), this Court refused to permit the holder of a certificate of convenience and necessity to collaterally attack the provisions of its certificate. The Court noted that, in obtaining its certificate, the holder had earlier

[6] Memorandum for the Respondents in Opposition, pp. 2-4.

[7] See also 1B Moore's Federal Practice, ¶ 0.405[8]; Note, 59 Harv. L.Rev. 1132 (1946); Note, "Estoppel Against Inconsistent Positions in Judicial Proceedings", 9 Brooklyn L. Rev. 245 (1940); Note, 1 Tenn. L.Rev. 1 (1922). The principle was expressed by Lord Kenyon in the maxim, "*Allegans contraria non est audiendus*".

argued before the Interstate Commerce Commission that the provisions of such certificates were not subject to collateral attack. This Court held that "[t]he appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval." 345 U.S. at 513. In *Davis* v. *Wakelee,* 156 U.S. 680 (1895), Wakelee had obtained a final state court judgment against Davis on certain notes following service by publication. When Wakelee sought to assert the underlying claim in a bankruptcy action, the bankrupt Davis successfully argued that Wakelee need not, and thus could not, do so since the claim had already been reduced to a valid final judgment and was not dischargeable. Thereafter Davis moved to set aside the original judgment on the ground that service by publication was unconstitutional, relying on *Pennoyer* v. *Neff,* 95 U.S. 714 (1878). This Court forbade Davis from maintaining such an inconsistent position as to the legality of service and the validity of the resulting judgment. 156 U.S. at 689-691.[8] See also *Philadelphia R.R. Co.* v. *Howard,* 54 U.S. (14 How) 307 (1851), *Ohio R.R. Co.* v. *McCarthy,* 96 U.S. 258 (1878).

These principles apply *a fortiori* when the party seeking to advance inconsistent positions is the government. A private party has an interest in winning an action regardless of the arguments or maneuvers it may use. The government's overriding interest is that justice should be

[8] "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim it was rendered without personal service upon him."

done; so long as that occurs the government has won, regardless of whether a particular defendant goes free or a civil litigant obtains injunctive or monetary relief. *Berger* v. *United States,* 295 U.S. 78, 88 (1935). Six circuits considering this question have all held that the government may not advance inconsistent positions.[9] As the Second Circuit pointed out in *Staten Island Hygeia Ice Co.* v. *United States,* 85 F.2d 68, 72 (1936), "[t]here is nothing in the nature of sovereignty or in the recognized prerogatives of the sovereign that would allow the government to take and keep a right without the accompanying burden".

The due administration of justice would be materially advanced by requiring the Solicitor General to respond to this Petition For Rehearing and to state definitively whether the government maintains that section 717 does or does not apply to discrimination occurring prior to March 24, 1974. If the Solicitor General adheres to the government's position in *Brown,* the instant case can be summarily reversed.[10] If the Solicitor General adheres to the government's position in the Sixth Circuit, the issues presented by the pending Petition for Writ of Certiorari in *Brown* will be substantially simplified, and the necessity for a grant of certiorari in the instant case, in view of the new and conflicting decision of yet another court

[9] *Goodman* v. *Public Service Commission,* 467 F.2d 375 (D.C. Cir. 1972); *United States* v. *Fox Lake State Bank,* 366 F.2d 962, 965-66 (7th Cir. 1966); *Vestal* v. *C.I.R.,* 152 F.2d 132 (D.C.Cir. 1945); *Eichelberger & Co.* v. *C.I.R.,* 88 F.2d 874 (5th Cir. 1937); *United States* v. *Brown,* 86 F.2d 798 (6th Cir. 1936); *Staten Island Hygeia Ice Co.* v. *United States,* 85 F.2d 68 (2d Cir. 1936); *United States* v. *Denver, etc., R.R.,* 16 F.2d 374, 376 (8th Cir. 1926).

[10] See, regarding the effect of such confessions of error *Urrutia* v. *United States,* 357 U.S. 577 (1958); *Howard* v. *United States,* 356 U.S. 25 (1958).

of appeals, will be manifest. Compare *Sanitary Refrigerator Co.* v. *Winters,* 280 U.S. 30, 34 n. (1929). Directing the Solicitor General to submit such a response is the most expeditious manner of precluding the government from continuing to advance different positions in different courts of appeal.

The inconsistent positions taken by the respondents doubtless reflect a good faith belief by the Department of Justice that it would be extremely undesirable to permit inquiry into claims that federal officials are breaking the law by discriminating on the basis of race or sex. But the national policy in this regard is to be made, not by lawyers in the executive branch, but by Congress. It was Congress which prohibited such discrimination in 1957. And it was Congress which, over the objections of the executive branch, mandated such judicial scrutiny in 1972. The issue presented by this case is the extent to which attorneys within the Department of Justice can thwart or delay implementation of congressional policy by asserting whichever of two inconsistent theories will, in any particular case, prevent aggrieved employees from obtaining a judicial remedy. It is the very essence of a government of laws that there should be, in a case such as this, but one rule, uniform and invariable, applied to all citizens, regardless of whether, in some instances, the result of that application may be displeasing to the men who chance to hold public office. *United States* v. *United Mine Workers,* 330 U.S. 258, 307-08 (1947) (Frankfurter, J. concurring). The ultimate responsibility for vindicating that principle is imposed by the Constitution on this Court.

CONCLUSION

For the above reasons, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court direct the Solicitor General to respond to this Petition for Rehearing, and that the Court thereafter grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Certificate of Counsel

As counsel for petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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Counsel for Petitioner

APPENDIX

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 935—September Term, 1973.

(Argued June 14, 1974 Decided November 21, 1974.)

Docket No. 73-2628

CLARENCE BROWN,

Plaintiff-Appellant,

v.

GENERAL SERVICES ADMINISTRATION, UNITED STATES OF AMERICA, TRANSPORTATION AND COMMUNICATIONS SERVICE, COMMUNICATIONS DIVISION, REGION 2, JOSEPH A. DALY, Regional Director, Transportation and Communications Service, ALBERT GALLO, Chief, Communications Division and FRANK A. LAPOLLA, Acting Chief, Communications Division, Transportation and Communications Service, Region 2,

Defendants-Appellees.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing a complaint which alleged racially discriminatory em-

ployment practices on the part of an agency and officials of the federal government.

Affirmed.

ERIC SCHNAPPER, New York, N.Y. (Jeff Greenup, Jack Greenberg, James M. Nabrit, III, Johnny J. Butler, Joseph P. Hudson and Greenup & Miller, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

CHARLES FRANKLIN RICHTER, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and Gerald A. Rosenberg, Asst. U.S. Atty., New York, N.Y., on the brief), *for Defendants-Appellees.*

TIMBERS, *Circuit Judge:*

This appeal from a judgment entered September 28, 1973 in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing the complaint in an action brought against an agency and officials of the federal government to redress alleged racially discriminatory employment practices presents the questions (1) whether Section 717(c) of the Equal Employment Opportunity Act of 1972[1] applies retroactively to claims arising before its

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1 Section 717(c) of the Equal Employment Opportunity Act of 1972 as codified in 42 U.S.C. §2000e-16(c) (Supp. II 1972), provides in pertinent part:

> "Within thirty days of receipt of notice of final action taken by [an] . . . agency, or by the Civil Service Commission upon an appeal from a decision or order of such . . . agency . . . on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the . . . agency . . . or with the Civil Service Commission on appeal from a decision or order of such . . . agency . . . until such time as final action may be taken by [an] . . . agency, . . . an employee . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the . . . agency, . . . shall be the defendant."

enactment; (2) whether the statute pre-empts any other federal jurisdictional basis for appellant's claim; and (3) whether in any event appellant has failed to exhaust administrative remedies. We hold that each of these questions must be answered in the affirmative. We affirm.

I. FACTS

Appellant Clarence Brown, a black, has been employed by the General Services Administration (GSA) Regional Office No. 2 (New York City) since 1957. He has not been promoted since 1966. His current job classification is Communications Specialist, GS-7, Telecommunications Division, Automated Data Telecommunications Service.

In December 1970, Brown was referred for promotion to GS-9 by his supervisors along with two white employees, Ownbey and Trost. All three were rated "highly qualified". Trost was the only one promoted. Brown filed an administrative complaint of racial discrimination with the GSA Equal Employment Opportunity Office. The complaint was withdrawn, however, after Brown was told that further promotions would soon be available and that he had been denied promotion because of lack of the requisite "voice experience".

Brown claims that he thereafter acquired full "voice experience". In June 1971, another GS-9 promotional opportunity opened. Brown and Ownbey again were rated "highly qualified" for the opening. A third white employee also was available. Ownbey was chosen.

On July 15, 1971, Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office, claiming racial discrimination in the denial of his promotion. An investigative report was prepared. After review, the GSA Regional Administrator determined that there was no evidence of racial discrimination and so informed Brown by letter dated October 19, 1972. This letter also informed Brown that he could request a hearing on his complaint within seven days; but that if he did not make such a request, the determination would become the final agency decision and he would then have the right to appeal the GSA's decision to the Board of Appeals and Review of the Civil Service Commission (CSC), or to file a civil action in the federal district court within 30 days.

Brown requested a hearing. It was held on December 13, 1972 before a complaints examiner of the CSC. Brown was represented by counsel. On February 9, 1973, the complaints examiner issued his findings and recommended decision. He found no evidence of discrimination and recommended that no action be taken on the basis of the complaint.

By letter dated March 23, 1973, received by Brown on March 26, the GSA Director of Civil Rights rendered the final agency decision that the evidence did not support the complaint of racial discrimination. The letter, pursuant to regulations, included a copy of the transcript of the hearing and of the findings and recommended decision of the complaints examiner. The letter also advised Brown of his options: (1) to file an appeal with the Board of Appeals and Review of the CSC within 15 days after receipt of the letter, in which case he could commence a civil action in the federal district court within 30 days after receipt of the Board's decision or 180 days after filing the appeal if no decision had been rendered; or (2) to commence a

civil action in the federal district court within 30 days after receipt of the letter.[2]

Brown did not file an appeal with the Board. Instead, he commenced the instant action in the district court on May 7, 1973—more than 30 days after receipt of the letter. His complaint named as defendants the GSA and Brown's superiors, Joseph A. Daly, Albert Gallo and Frank A. Lapolla.

Basically, Brown's complaint alleges that he has been denied promotions because of his race.[3] Apparently he seeks a promotion to Communications Assistant, GS-9, a supervisory position, and appropriate back pay, although some reference is made in his brief to damages based on discrimination.

The original complaint alleged jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1970); Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16 (Supp. II 1972); 28 U.S.C. §1331 (1970); and the Declaratory Judgment Act, 28 U.S.C. §§2201-02 (1970). The complaint also sought to invoke jurisdiction to secure protection of and redress deprivation of rights secured by 42 U.S.C. §§2000e et seq. (1970) and 42 U.S.C. §1981 (1970). The complaint demanded "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay."[4]

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2 The provisions for civil actions are set forth in Section 717(c) of the Equal Employment Opportunity Act, 42 U.S.C. §2000e-16(c) (Supp. II 1972). See note 1 *supra*.

3 The position of the GSA is that Brown is a somewhat uncooperative employee and therefore has not been promoted. The substantive dispute, however, is not before us on this appeal. Our decision is limited to the threshold jurisdictional questions presented.

4 Relief available under Title VII and the regulations promulgated thereunder would include retroactive promotion with back pay and attorney's fees. 42 U.S.C. §§2000e-16(d), 2000e-5(g) (Supp. II 1972); 42 U.S.C. §2000e-5(k) (1970); 5 C.F.R. §713.271(b) (1974).

On July 23, 1973, defendants moved to dismiss the complaint on the ground that the court lacked subject matter jurisdiction since Brown had not filed his complaint within 30 days as required by Section 717(c) of the Equal Employment Opportunity Act of 1972 and his action therefore was barred by sovereign immunity.

On September 18, 1973, Brown moved for leave to file an amended complaint. The proposed amended complaint sought to add the CSC and Selbmann, the complaints examiner, as defendants, the original complaint having stated that the CSC had been joined as a party defendant although it was not actually named. The amended complaint also alleged as additional bases of jurisdiction 28 U.S.C. §1343 (4) (1970) and the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970), and added an allegation that more than $10,000 was in controversy.[5]

In a memorandum opinion filed September 27, 1973, Judge MacMahon held that Brown's action was barred by sovereign immunity and that the district court therefore lacked subject matter jurisdiction. The judge also denied the motion for leave to amend on the ground that the original complaint had been dismissed and the proposed amended complaint did not change the situation.

The essential questions thus presented are whether Section 717(c) of the Equal Employment Opportunity Act of 1972 is to be applied retroactively to claims arising before but pending administratively at the time of its enactment; if so, whether that Act pre-empts any other avenue of judicial review; and whether in any event appellant has failed to exhaust administrative remedies.

5 Although the original complaint had alleged jurisdiction under 28 U.S.C. §1331 (1970), no jurisdictional amount was alleged.

II. Legislative History and Statutory Provisions

We believe that a key to the resolution of these questions may be found in the legislative history and the statutory provisions that emerged.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex or national origin. 42 U.S.C. §§2000e-2 to -3 (1970), as amended (Supp. II 1972). As originally enacted in 1964, however, it did not apply to federal employees. 42 U.S.C. §2000e(b) (1970). Executive Orders[6] and agency regulations covered their complaints of employment discrimination.[7] In general, the agency itself conducted an investigation and hearing on such complaints. Although the hearing examiner might come from an outside agency, especially the CSC, the head of the employee's agency made the final agency determination. Appeal lay only to the Board of Appeals and Review of the CSC.[8]

No private right of action was provided for federal employees by Title VII until 1972 when Congress amended the Equal Employment Opportunity Act by adding Section 717(c). The legislative history of this section generally evinces a concern that job discrimination had not been eliminated in the federal government. It indicates the dissatisfaction of federal employees with the complaint procedures available. The committee reports show that Congress was not persuaded by testimony of agency officials that legislation was not needed because a private right

6 See Exec. Order No. 11478, as amended, Exec. Order 11590, 3 C.F.R. 207 (1974), 42 U.S.C. §2000e, at 10,297 (1970); Exec. Order 11246, as amended, Exec. Order 11375, 3 C.F.R. 169 (1974), 42 U.S.C. §2000e, at 10,294-97 (1970).

7 See 5 C.F.R. Pt. 713 (1971).

8 *Id.*; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, at 410, 423 (1972) (hereinafter cited as Legislative History).

of action already existed. They note that, even if such right was available, the federal employee faced defenses of sovereign immunity and failure to exhaust administrative remedies; and, even if such defenses were overcome, the relief available, such as back pay or immediate advancement, was in doubt.[9]

It was against this backdrop that Congress in 1972 provided a private right of action for federal employees who were not satisfied with the agency or CSC decisions. Under Section 717(c), an aggrieved employee may commence an action in a federal district court within 30 days after a final order by his agency on a complaint of discrimination based on race, color, religion, sex or national origin, *or* within 30 days after a final order of the CSC on an appeal from such an agency decision, *or* after the elapse of 180 days from the filing of the initial complaint with the agency or of the appeal with the CSC if no decision has been rendered. No appeal need be taken to the CSC. The employee may go directly to court after the agency decision. 42 U.S.C. §2000e-16(c) (Supp. II 1972), note 1 *supra*.

III. Retroactivity

Brown's administrative complaint was filed with the GSA in 1971. It was under agency consideration at the time of the enactment of Section 717(c) on March 24, 1972. The question of retroactivity thus presented is whether the section should be applied to claims of discrimination which arose before its effective date but were awaiting final administrative decision at that time.[10] Retroactivity in this

9 H. R. Rep. No. 92-238, 92d Cong., 1st Sess. 23-26 (1971), in Legislative History 61, 82-26; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14-17 (1971), in Legislative History 410, 421-26.

10 Cf. *Petterway* v. *Veterans Administration Hospital*, 495 F.2d 223 (5 Cir. 1974) (Section 717(c) held not applicable to pre-Act claim of federal employment discrimination because complaint was no longer pending in agency at time of enactment and because complaint was filed beyond 30 day period).

context refers only to the claim; the district court complaint in the instant action was filed on May 7, 1973—well after the date of enactment.

All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they assume retroactive operation in their arguments here although they have argued otherwise elsewhere. Appellant argues that the section is not applicable to the instant action precisely because he did not file his complaint within the required 30 days and that other statutes provide a jurisdictional basis for his action.

The issue of retroactive application of this statute has resulted in a conflict between the circuits. The District of Columbia and Fourth Circuits have held that Section 717(c) applies retroactively to claims pending at the time of its enactment. *Womack* v. *Lynn*, —— F.2d —— (D.C. Cir. 1974) (No. 72-1827, filed October 1, 1974); *Koger* v. *Ball*, 497 F.2d 702 (4 Cir. 1974). The Sixth Circuit has held that it does not. *Place* v. *Weinberger*, 497 F.2d 412 (6 Cir. 1974). The district courts have gone both ways. Compare, e.g., *Ficklin* v. *Sabatini*, 378 F.Supp. 19 (E.D. Pa. 1974) (retroactive); *Henderson* v. *Defense Contract Administration Services*, 370 F.Supp. 180 (S.D.N.Y. 1973) (retroactive); *Walker* v. *Kleindienst*, 357 F.Supp. 749 (D.D.C. 1973) (retroactive) with *Moseley* v. *United States*, No. 72-380-S (S.D. Cal., filed January 23, 1973) (non-retroactive); *Hill-Vincent* v. *Richardson*, 359 F.Supp. 308 (N.D. Ill. 1973) (non-retroactive).

The conflict as to retroactivity has turned on whether Section 717(c) is to be viewed as providing a new substantive right for federal employees or whether it merely provides a new remedy for enforcing an existing right.

The pre-1972 right of a federal employee not to be discriminated against is said to be found in Congressional enactments, 5 U.S.C. §7151 (1970), and Executive Orders. Exec. Orders 11246, 11478, note 6 *supra*. Courts which have adopted the view that Section 717(c) provides a new remedy for enforcing an existing right have held the section retroactive on the grounds that it is remedial, *Henderson* v. *Defense Contract Administration Services, supra,* or that it is procedural. *Koger* v. *Ball, supra.*

Courts which have refused to give retroactive effect to the statute, aside from rejecting the view that Section 717(c) merely creates a new remedy for a pre-existing right, have held that Congress intended only certain portions of the Equal Employment Opportunity Act to be retroactive for the reason that in Section 14 of the Act, in 42 U.S.C. §2000e-5, at 1,257 (Supp. II 1972), there is a specific provision that amendments to one section of Title VII are to be given retroactive effect, and since there is no reference in Section 14 to Section 717(c), the latter should not be given retroactive effect. See, e.g., *Place* v. *Weinberger, supra.*

This latter view strikes us as being inconsistent with the underlying principle of *Bradley* v. *School Board of City of Richmond,* —— U.S. —— (1974), 42 U.S.L.W. 4703 (U.S. May 15, 1974). There the Supreme Court held that a statute[11] authorizing a federal court to award attorney's fees in school desegregation cases should have been applied by the Court of Appeals so as to result in the affirmance of the decision of the District Court which had awarded such fees on the basis of its general equity power, since the statute was enacted after the District Court's award but before

11 Section 718 of the Emergency School Aid Act, Title VII of the Education Amendments of 1972, 20 U.S.C. §1617 (Supp. III 1973).

the Court of Appeals' decision. The rationale of the Supreme Court's decision was stated as follows:

> "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." —— U.S. at ——, 42 U.S.L.W. at 4707.

We believe that this principle applies here. Neither the statute itself nor the legislative history gives any direction as to whether Section 717(c) should be applied to complaints pending within the agency at the time of its enactment. In light of *Bradley,* we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger, supra,* that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only. As the Supreme Court stated in *Bradley:*

> "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.
>
> Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. . . ." —— U.S. at ——, 42 U.S.L.W. at 4708.

While *Bradley* dealt with a court of appeals' review of a district court's decision, we believe that the underlying principle is applicable to a review by a district court of an agency decision. So far as the statutory language and the relevant legislative history are concerned, retroactive application of Section 717(c) would appear to be appropriate.

This does not end our analysis under *Bradley.* We must determine whether application of a change in law to pend-

ing claims "would result in manifest injustice". —— U.S. at ——, 42 U.S.L.W. at 4707. In each of the cases where Section 717(c) has been applied retroactively, it was done to *aid* a plaintiff in the prosecution of his complaint. See, e.g., *Koger* v. *Ball, supra.* In view of the policy of the federal government against discrimination in federal employment and its encouragement of efforts to eliminate such discrimination in the private and state and local government sectors, such retroactive application of the statute appears sound. If Section 717(c) is held applicable here, however, Brown's claim must fall since he admittedly has failed to comply with its 30 day filing requirement.

We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument, particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it.[12] In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since we hold below that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

IV. Pre-emption

Appellees argue that, whatever may be the merits of the alternative bases for jurisdiction asserted by appellant,

12 It is interesting to note that both the original complaint and the proposed amended complaint invoked Section 717 as one basis of jurisdiction in the district court.

they are pre-empted by Section 717(c). Neither the Act itself nor its legislative history conclusively demonstrates that such pre-emption was intended. Congress enacted Section 717(c) to provide a private right of action for federal employees—a right it believed to have been previously non-existent or so difficult to enforce as to have been in effect non-existent. The most persuasive argument in favor of pre-emption is that the Act constitutes a waiver of sovereign immunity and as such must be strictly construed.

The doctrine of sovereign immunity forbids suits against the government without its consent. Sovereign immunity in the present context involves not only that of the United States but also that of its officers in performing their official functions. As the Eighth Circuit succinctly put it:

> "A suit against an officer of the United States is one against the United States itself 'if the decree would operate against' the sovereign, *Hawaii* v. *Gordon,* 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed. 2d 191 (1963); or if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration', *Land* v. *Dollar,* 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act', *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949). . . ." *Gnotta* v. *United States,* 415 F.2d 1271, 1277 (8 Cir. 1969) (Blackmun, *J.*), *cert. denied,* 397 U.S. 934 (1970).

The court in *Gnotta* held that demands for promotion and back pay fall within the scope of this immunity as they necessarily involve expenditures from the Treasury and compel the exercise of administrative discretion in an official personnel area. 415 F.2d at 1277. This is precisely the relief demanded in the instant case.

Sovereign immunity would bar prosecution of this action absent an effective waiver. Congress can impose restrictions on its consent to be sued, *Battaglia* v. *United States*, 303 F.2d 683, 685 (2 Cir.), *cert. dismissed*, 371 U.S. 907 (1962), including limitations on the time within which suit must be commenced. *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1357 (5 Cir. 1972). The consent Congress has given for the instant type of action is set forth in Section 717(c). Such consent is conditioned on compliance with the 30 day filing requirement.

Statutes waiving sovereign immunity are to be strictly construed. But assuming, as appellant argues, that decisions of the Supreme Court illustrate a more liberal attitude with regard to waivers of sovereign immunity at least where a federal agency is concerned, see *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939), we cannot ignore the explicit condition imposed by Congress on a suit such as the instant one. It would wholly frustrate Congressional intent to hold that a plaintiff could evade the 30 day filing requirement "by the simple expedient of putting a different label on [his] pleadings." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973).

The instant complaint was filed more than a year after passage of the 1972 Act. Brown had notice of its provisions. He has offered no excuse for failure to comply, nor has he addressed the issue of retroactivity. We find no injustice in requiring compliance with the 30 day filing requirement. On the contrary, to permit suit without compliance with the conditions imposed by Section 717(c) would effectively undermine the strong public policy that requires strict construction of a statute which waives sovereign immunity.[13]

13 In view of our holding, we find it unnecessary to consider appellant's claims that jurisdiction can be founded on 28 U.S.C. §1361 (1970) (mandamus); the Administrative Procedure Act, 5 U.S.C. §§701-06 (1970); the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970); and 42 U.S.C. §1981 (1970) and 28 U.S.C. §1343(4) (1970).

V. Failure to Exhaust Administrative Remedies

Finally, even if we were to hold in favor of Brown on the issues discussed above, his claim would fall for failure to exhaust administrative remedies under regulations in effect prior to the 1972 Act. Although he pursued these remedies to the extent of obtaining a final agency decision, he failed to appeal to the Board of Appeals and Review of the CSC. See 5 C.F.R. §§713.231 to .234 (1974), 34 Fed. Reg. 5371 (1969).

Assuming without deciding that exhaustion of federal administrative remedies may not be required in every case of alleged discriminatory federal employment practices, cf. *McKart* v. *United States*, 395 U.S. 185 (1969); but see *Penn* v. *Schlesinger*, 490 F.2d 700, 707-14 (5 Cir. 1973) (dissenting opinion), *rev'd en banc*, 497 F.2d 970 (5 Cir. 1974) (adopting panel dissent), there is nothing in the allegations of Brown's complaint which justifies the "premature interruption of the administrative process." *McKart* v. *United States, supra*, 395 U.S. at 193. The "notions of judicial efficiency" stressed by the Court in *McKart* are particularly applicable here:

> "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." 395 U.S. at 195.

For aught that appears in the record before us, we cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. Since he did not exhaust his administrative remedies, however, we have been presented with troublesome jurisdictional questions

which must be resolved before the substantive issue of discrimination can even be considered. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 712.

Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. Cf. *McKart* v. *United States, supra,* 395 U.S. at 200; *Eisen* v. *Eastman,* 421 F.2d 560, 569 (2 Cir. 1969), *cert. denied,* 400 U.S. 841 (1970). Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. §713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 706.

Under the circumstances of this case, we hold that Brown inexcusably failed to exhaust available administrative remedies.

Conclusion

Clearly the federal courts have jurisdiction under Section 717(c) of the Equal Employment Opportunity Act of 1972 to review claims by federal employees of discriminatory employment practices. Brown's failure to comply with the statutory requirements with respect to appealing to the Board of Appeals and Review of the CSC, or by commencing a timely action in the district court, has presented the threshold jurisdictional issues to which this opinion is addressed. We hold that his failure to commence the instant action in the district court within 30 days of the final agency decision is fatal to his complaint since Section 717(c) operates retroactively and preempts any other avenue of judicial review; and that he has failed to exhaust available administrative remedies. The entire process of administrative review by the CSC and of judicial review within the 30 day period for seeking such review makes no sense at all if an employee may simply ignore the statutory requirements.

Affirmed.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

DIANE M. PLACE,

Petitioner,

v.

CASPAR WEINBERGER, *et al.*

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Petitioner Diane M. Place submits this supplemental memorandum in support of her Petition for Rehearing.

As is set out more fully in the Petition for Rehearing, the United States in *Brown* v. *General Services Administration,* 507 F.2d 1300 (2d Cir. 1974) argued in the Second Circuit that section 717 *does* apply to acts of discrimination occurring before March 24, 1972, the direct opposite of the position taken by the government in the Sixth Circuit in the instant case. By successfully advancing conflicting arguments in different courts of appeals the United States thus brought about a conflict between those circuits. A Petition for a Writ of Certiorari was filed in *Brown* v. *General Services Administration* on December 20, 1974. No. 74-768. In view of the government's role in creating this conflict between *Brown* and the instant case, it was clearly incumbent upon the Solicitor General in responding to the petition in *Brown* to advise this Court which decision the

United States maintained was correct. Instead, the Solicitor General opposed certiorari in *Brown*, as he did in this case, while refusing to take any position on the merits of the decision,[1] so as to leave government attorneys free to continue to advance conflicting arguments in the lower courts. Thus the United States, having successfully advanced inconsistent positions in two courts of appeals, now asks this Court to simultaneously uphold *both* of the conflicting decisions. Petitioner submits that it would be inappropriate to do so in light of this Court's responsibility to maintain uniformity among the circuits and to relieve the lower federal courts of the burden of resolving questions which arise solely because of the government's refusal to adhere to a single position.

Petitioner also asserted below and in this Court that federal jurisdiction over her claims existed under several federal statutes enacted prior to section 717, including 28 U.S.C. § 1361, an argument which the Sixth Circuit rejected. In opposing Certiorari in the instant case, the Solicitor General took no position on the merits of this argument. The petitioner in *Brown* also argued that federal jurisdiction existed under these earlier statutes. In *Brown* the Solicitor General contested the existence of such jurisdiction on the sole ground that Brown had not exhausted his administrative remedies.[2] In the instant case, however, petitioner Place did exhaust her administrative remedies. It thus appears that, in opposing Certiorari on this issue in the instant case, the Solicitor General is asking this Court to uphold a decision which he believes to be incorrect.

The failure of the Solicitor General to take a position on the merits of the issues raised by this case, as his

[1] Brief for Respondents in Opposition, *Brown* v. *General Services Administration*, No. 74-768, p. 5.

[2] *Id.*, p. 6.

similar failure in *Brown*,[3] is not fortuitous. It arises, as the Solicitor General has indicated,[4] from the differing interests and positions within the Department of Justice between the Civil Division, which is primarily concerned with winning civil suits against the United States, and the Civil Rights Division, which is primarily concerned with ending discrimination. Both fairness to individual litigants and the efficient administration of justice require that the Attorney General resolve these differences and enunciate unequivocally the position of the United States on the important questions of law at issue.

Accordingly, the government should be directed to respond to the Petition for Rehearing and to state its position on the following questions of law:

(1) Does section 717 of the Equal Employment Opportunity Act of 1972 provide a remedy for acts of discrimination occurring before March 24, 1972?

(2) Is federal jurisdiction over discrimination in employment by the United States on the basis of race or sex provided by 5 U.S.C. §§ 703-706, 28 U.S.C. §§ 1331, 1346, 1361, or 42 U.S.C. § 1981?

[3] See Reply Memorandum in Support of Petition for Writ of Certiorari, *Brown* v. *General Services Administration*, No. 74-768.

[4] Letter of Robert Bork to Hon. Michael Rodak, regarding *Brown* v. *General Services Administration*, dated February 11, 1975.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

DIANE M. PLACE, PETITIONER

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CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

ROBERT H. BORK,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-116

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CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

On April 14, 1975, this Court requested the Solicitor General to file a response to the petition for rehearing of this Court's denial of certiorari. The petition for rehearing is founded on the assertion that "the government advanced inconsistent positions" (p. 3) in the courts of appeals in the present case and in *Brown* v. *General Services Administration*, 507 F. 2d 1300 (C.A. 2), pending on petition for a writ of certiorari, No. 74-768, with respect to the retroactive effect of Section 717(c) of the Equal Employment Opportunity Act of 1972. That assertion, as we show below, is inaccurate.

We do not oppose the petition for rehearing, however, because we have concluded that the position the government has previously taken in the lower federal courts on the retroactivity issue—a position adopted by the court of appeals in this case—is in error.

1. The government has consistently argued in the district courts and courts of appeals that Section 717(c) does not apply to federal employment discrimination claims in which the alleged discrimination took place prior to the effective date of the 1972 Act. With respect to cases in which a complaint had not finally been determined prior to the Act's effective date, that argument has been rejected by every court of appeals that has considered it, except for the Sixth Circuit in the present case. See *Koger* v. *Ball*, 497 F.2d 702 (C.A. 4); *Womack* v. *Lynn*, 504 F. 2d 267 (C.A. D.C.); *Sperling* v. *United States*, C.A. 3, No. 74-1533, decided April 18, 1975.

In *Brown* v. *General Services Administration*, *supra*, the retroactivity issue was not directly presented. Since the plaintiff there had failed to bring an action within the 30-day period specified by Section 717(c), he could not rely on that section as a basis of subject matter jurisdiction. He argued, instead, that jurisdiction was conferred by the Mandamus Statute (28 U.S.C. 1361), the Administrative Procedure Act (5 U.S.C. 701, *et seq.*), the Tucker Act (28 U.S.C. 1346), and the old civil rights legislation (28 U.S.C. 1343(4) and 42 U.S.C. 1981). Brown's appellate counsel (three of whom also represent petitioner in the present case) also argued in their brief to the court of appeals that "Congress did not intend Section 717 to be the exclusive judicial remedy available to federal employees" alleging employment discrimination (Br. 7).

The government's brief[1] responded by arguing that none of the statutes relied on by Brown conferred subject matter jurisdiction (pp. 19-28). The government also took issue with Brown's assertion concerning the preemptive effect of Section 717, arguing alternatively that, even if jurisdiction might otherwise have been conferred by the statutes invoked by Brown, Section 717 was intended by Congress to provide an exclusive judicial remedy.

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[1]We have lodged with the Clerk of this Court a copy of the government's brief in the court of appeals in *Brown*.

The government's brief did not argue that Section 717(c) should be applied retroactively to Brown's complaint (which alleged pre-March 24, 1972, discrimination). It argued only that *if* Section 717(c) were applicable, it would preclude reliance on other jurisdictional bases. The brief stated (p. 6, n.):

> This [preemption] argument presumes that the Act applies in the present case where the complaint, while alleging discrimination occurring before passage of the Act, was filed after the Act became effective. *Hackley* v. *Johnson*, 360 F. Supp. 1247, 1249 n. 1 (D.C. 1973), *appeal docketed*; *Henderson* v. *Defense Contract Administration Services Region*, 7 EPD para. 9058 (S.D. N.Y. 1974), have so held. The Government has argued differently in its appeal brief in *Hackley*. In any event, should this Court conclude that these holdings are correct, the fact that the Government has elsewhere argued otherwise is plainly immaterial.[2]

The court of appeals, which ultimately concluded, in part, that Section 717 did apply to Brown's complaint and was intended to be the exclusive judicial remedy for federal employment discrimination claims, made clear in its opinion that it correctly understood the government's preemption argument to be founded on an assumption *arguendo* that Section 717 was applicable. The court stated: "All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they

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[2]The Assistant United States Attorney who presented the oral argument before the court of appeals in *Brown* has informed us that he recalls stating during argument that there were conflicting court of appeals decisions on the retroactivity issue and that it was the position of the United States Attorney's office that retroactive application of the Act was the better view. He did not represent that to be the position of the government generally; indeed, he acknowledged, as did the brief, that the government had argued to the contrary in other cases.

assume retroactive operation in their arguments here although they have argued otherwise elsewhere" (507 F. 2d at 1305).[3]

2. Although the government has consistently argued that Section 717 applies only to discrimination occurring after enactment of the 1972 Act, we have reexamined our position in light of the additional court of appeals decisions holding to the contrary in certain circumstances. We have concluded, essentially for the reasons stated by the Fourth Circuit in *Koger* v. *Ball*, *supra*, 497 F. 2d at 704-709, and by the Second Circuit in *Brown* v. *General Services Administration*, *supra*, 507 F.2d at 1304-1306, that Section 717 does apply to claims of federal employment discrimination occurring prior to March 24, 1972, if the employee's complaint was the subject of administrative proceedings on that date or if a judicial proceeding had been timely commenced after final administrative action and was pending on the Act's effective date. In those circumstances, the applicability of Section 717 is consistent with "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the

[3]Although the court in *Brown* held that Section 717 applied retroactively to the complaint and preempted other jurisdictional bases, it also held alternatively that the other bases of jurisdiction were unavailable to Brown because he failed to exhaust his available administrative remedies (507 F. 2d at 1307-1308). It was upon the latter ground that we opposed the petition for a writ of certiorari in *Brown*. Petitioner in the present case states that "it was clearly incumbent upon the Solicitor General in responding to the petition in *Brown* to advise this Court" of his position on the retroactivity issue (Supplemental Memorandum in Support of Petition for Rehearing, p. 1). But since the petition in *Brown* did not present the retroactivity issue, we do not see why the Solicitor General should be faulted for not addressing that question in his response.

contrary" (*Bradley* v. *Richmond School Board*, 416 U.S. 696, 711).[4] The government will accordingly acquiesce in this construction of the Act in all pending and future cases involving allegations of pre-1972 Act discrimination.[5]

We originally opposed the petition for a writ of certiorari in this case because of our view that the narrow conflict among the courts of appeals here is not of continuing importance. We adhere to that view. Since we have now reexamined the government's position on the legal issue in light of additional court of appeals decisions, however, we believe that it would be appropriate to grant the petition for rehearing and the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court for further consideration in light of our present position.[6]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

[4]We adhere to the view that Section 717 is inapplicable to such claims where the administrative complaint was finally determined prior to the Act's effective date and no pending judicial proceeding had been timely initiated after the final administrative determination. See *Clark* v. *Goode*, 499 F. 2d 130 (C.A. 4).

[5]We have not been able to ascertain the number of such cases that are presently pending in the federal courts. The General Counsel's office in the Civil Service Commission roughly estimates that there are approximately 25 to 30 such cases.

[6]We note that, while the decision of the court of appeals in the present case was rendered five days after the Fourth Circuit's decision in *Koger* v. *Ball*, *supra*, the court did not refer to that decision and may have been unaware of it.